Supreme Court, U.S.
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No. 02-1373

In The
Supreme Court of the United States

MARIAN L. OLSON and IDA MAE BRUESKE,

Petitioners,

v.

HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; FIRST BANK OF ARVADA, N.A.; THE CITY OF GOLDEN, a Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. RESPONDENTS DO NOT REFUTE PETITIONERS' ESSENTIAL ARGUMENTS FOR GRANTING THE WRIT OF CERTIORARI

The Petitioners (collectively referred to as "Olson") request review by this Court because their due process claim involves an important federal matter, because there are deep divisions among federal circuit courts and state supreme courts, and because opinions by this Court do not provide adequate guidance. In their *Brief in Opposition*, Respondents (collectively referred to as the "City of Golden") do not refute ***any*** of these reasons for granting the *Petition for Writ of Certiorari* (the "*Petition*").

Olson's claim to a property interest is an important matter because due process acts as the irreducible minimum of government protection that must be afforded life, liberty, and property. It establishes a floor, below which government – state and federal – cannot sink.

Here, the Colorado Supreme Court looked at a property regulatory scheme that gave Olson a certain degree of protection to her home and the use and enjoyment of it. In the words of the City of Golden: "In effect, Petitioners are claiming that the zoning regulations grant them a property interest in restricting Hillside's uses similar in nature to a restrictive covenant." *Opp. Brief* at 17. Olson basically agrees with this characterization. Olson has a right to due process because the City of Golden's land use regulations give her a legitimate claim of entitlement, and the City of Golden, and then the Colorado Supreme Court, violated Olson's due process rights when they refused to recognize

that Olson had a property right deserving of Fourteenth Amendment protection.[1]

The City of Golden concedes – indeed even identifies – fundamental splits that must necessarily be resolved if this Court grants the *Petition*. It urges (in an argument more properly addressed at the merits stage) that land use regulation should ***never*** give rise to a property right because such regulation involves only "procedure," relying upon *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983). *See Opp. Brief* at 4. As discussed below, the City of Golden also identifies other courts that have disagreed with this view, finding the existence of property rights subject to protection under the Due Process Clause in the land use context. Olson here identifies two existing legal theories that provide her with property rights protected by the Due Process Clause: Olson had a property right because the decisions by the City of Golden fundamentally impacted the home she owned, or Olson had a legitimate claim of entitlement under the applicable regulatory scheme.

The City of Golden cannot point to any clear guidance from this Court that resolves Olson's claim to a property right. On the contrary, the City of Golden draws arguments from different opinions decided by this Court, all in an effort to show that Olson in fact did not have a property interest. But there is no consistency or coherency to the arguments. For example:

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[1] As noted in the *Petition*, the trial court found that Olson had a property right, and the Colorado Court of Appeals affirmed the existence of that property right. The Colorado Supreme Court then reversed the Court of Appeals and held that Olson did not have a property right under the applicable City of Golden ordinances.

a. Olson has no rights as a neighboring landowner. *Opp. Brief* at 7, 14-15.

b. Olson's rights are only "procedural." *Opp. Brief* at 8-10.

c. The legitimate-claim-of-entitlement test under *Board of Regents v. Roth*, 408 U.S. 564 (1972) should not even apply in the land use context. *Opp. Brief* at 10-14. *See especially id.* at 12 ("Even if Petitioners could establish a mandatory duty on the part of the planning commission to deny a special use application, the *Roth* test should have no application to them."). Indeed, the City of Golden asserts that courts recognizing such use of the *Roth* test are wrong. *Opp. Brief* at 16 ("The reasoning of the Second Circuit and the Connecticut Supreme Court is more sound than the footnoted dicta of the Tenth Circuit and the Colorado Supreme Court.").

d. Relatedly, the *Roth* test should be limited to those situations where the deprivation involves "an ascertainable monetary value." *Opp. Brief* at 12.

e. The deprivation Olson was subjected to is analogous to placing a billboard in someone's neighborhood which does not give rise to a due process violation. *Opp. Brief* at 17-18.[2]

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[2] This point, purportedly supported by *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 674 (1999), is inapposite. The quote offered by the City of Golden assumes that a property right already exists, and that case is more appropriately characterized as involving diminution in value which is very different than this case, which is centered on determining whether there is a property right in the first instance warranting due process protection.

In short, this case cleanly poses the basic question of whether there is even a property right in the first instance that would warrant due process protection. Not once do respondents ever rebut this fundamental point; indeed, they proffer numerous arguments – all proper at the merits stage – why Olson does not have a property right warranting due process protection. A careful review of the *Brief in Opposition* offers affirmative support for Olson's argument that this Court should grant the *Petition*.

II. THE *PETITION* AFFORDS THIS COURT AN IDEAL OPPORTUNITY TO RESOLVE DIFFERENCES AMONG CIRCUIT COURTS

Not only does the *Brief in Opposition* fail to rebut Olson's arguments, but it offers further evidence that this Court should grant the *Petition*. In defending the decision of the Colorado Supreme Court, the *Brief in Opposition* shows the difficulty in defining a due process property interest by relying on existing Supreme Court case law. Both the City of Golden and Olson have identified confusion among the courts over the meaning of a due process property interest applied to governmental land use decisions, and the *Brief in Opposition* provides several examples of this confusion and disagreement among the courts.

This *Petition* presents a clear opportunity to resolve this discord. Olson has framed the issues appropriately, so that this Court may adopt one of three general standards used by the lower courts. Likewise, this case enables the Court to give meaning to the legitimate-claim-of-entitlement test in the land use context. Finally, much of the *Brief in Opposition* either discusses other elements of Olson's due process claim that go to the merits or that are

best resolved by the Colorado Supreme Court after this Court has defined a property interest and remanded this case. In any event, the City of Golden does little more than provide additional reasons why certiorari review is warranted.

A. Courts below Remain Deeply Divided over the Meaning of a Property Interest under the Due Process Clause in Land Use Decisions.

The *Brief in Opposition* strongly supports Olson's central point; that courts are deeply divided over the meaning of a property interest under the due process clause. In general, the *Brief in Opposition* argues the merits of Olson's claim to a property interest. By doing so, the City of Golden attempts to dissuade this Court from granting the *Petition* by arguing that Olson will lose on the merits. But by arguing the merits, the *Brief in Opposition* provides several examples of confusion and disagreement in the courts below.

First, the City of Golden highlights several conflicting tests that may be applied to determine a property interest in the land use context. The City of Golden relies on *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) to argue that zoning and land use decisions cannot implicate a property interest, because zoning decisions are only procedural in character. *Opp. Brief* at 8-10. It cites several federal courts that have followed this approach, including *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-167 (7th Cir. 1994), *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992), and *Fusco v. Connecticut*, 815 F.2d 201, 205-206 (2d Cir. 1987).

Yet the *Brief in Opposition* also recognizes that many federal appellate courts will find a property interest in land use decisions if one can show a legitimate-claim-of-entitlement, a test that arises from this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972). As evidence, it cites the following cases: *Gardner v. City of Baltimore*, 969 F.2d 63, 71 (4th Cir. 1992); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); and *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989). *Opp. Brief* at 13.

The *Brief in Opposition* contradicts itself yet a third time, claiming that in fact land use regulations cannot implicate a property interest. As support, it relies on *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 674 (1999). But the hypothetical question posed by that opinion dealt with the common law tort of unfair-competition, which has little to do with land ownership or governmental regulation. Furthermore, the application of *College Savings Bank* to the questions at hand is obscure at best, and has eluded both the Colorado Supreme Court in this case, as well as federal circuit courts on this issue. *See, e.g., George Washington University v. District of Columbia*, 318 F.3d 203, 207 (D.C. Cir. 2003).

Second, the City of Golden makes clear that existing case law from this Court provides little guidance as to the meaning of a property interest in the land use context. For example, the *Brief in Opposition* attempts to draw salient analogies to the case at hand by comparing it to the evolution of a property interest in employment law. *Opp. Brief* at 12. In another instance, the City of Golden argues that *Roth* only applies to items of monetary value, *Opp. Brief* at 12, and later cites *Village of*

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), for its claims that a "diminution in monetary value does not implicate the Due Process Clause," *Opp. Brief* at 18. At one point, the City of Golden agrees with Olson that the Colorado Supreme Court improperly applied the legitimate-claim-of-entitlement test to this case, stating that the clear entitlement test "doesn't make sense" in this particular context. *Opp. Brief* at 13-14. Likewise, the City of Golden argues that "[n]o good reason exists to extend the *Roth* test to non-applicants in the land use context," *Opp. Brief* at 16, but it cites no authority for that statement. The City of Golden's failure to find some definitive guidance from this Court again underscores why certiorari review is appropriate.

Third, the City of Golden concedes that there is considerable disagreement among those courts that find a property interest if one can show a legitimate claim of entitlement. *Opp. Brief* at 6. The City of Golden concedes there is a division between the Second Circuit and the Connecticut Supreme Court on one hand, and the Tenth Circuit and the Colorado Supreme Court on the other. *Opp. Brief* at 16. Indeed, the *Brief in Opposition* describes the real legal disagreements among courts even when those courts agree that land use decisions can give rise to a property right if the claimant can establish a legitimate claim of entitlement. At the very least, this admitted disagreement shows why certiorari review is warranted.

B. The Issues Before this Court Are Framed Appropriately.

Although the City of Golden has submitted three Questions Presented in opposition to Olson's issues, the

issues presented by them are not properly before this Court. A respondent may respond to the questions presented by a petitioner only if there is "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court . . . " Sup. Ct. R. 15(2). Here, the City of Golden has not identified any misstatement of fact or law in the *Petition* that bears on the issues before this Court, and it has merely tried to reframe the issues in an argumentative manner in its favor. Accordingly, Olson has properly framed the issues for this Court.

C. This Court May Grant Relief to Petitioners.

In the *Petition*, Olson has demonstrated for this Court that federal circuit courts and state supreme courts employ essentially three different approaches with respect to a property interest: the first approach rejects the principle that a property owner has a property right in the land use context. The second approach assumes that ownership of property alone gives rise to a property right for due process purposes. The third approach finds a property interest if one can show a legitimate claim of entitlement under the regulatory scheme at issue.

This Court can award Olson relief by adopting the second approach, used by the Third Circuit in *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), *cert. denied*, 516 U.S. 937 (1995), *rev'd on other grounds sub nom. United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 398-402 (3d Cir. 2003), by the Delaware Supreme Court in *Dale v. Town of Elsmere*, 702 A.2d 1219, 1225 (Del. 1997) and by the Oklahoma Supreme Court in *DuLaney v. Oklahoma State Department of Health*, 868

P.2d 676, 678 (Okla. 1994). This Court may also grant Olson relief if it adopts the third approach, which finds a property interest only if one shows a legitimate claim of entitlement, because the current *Petition* certainly allows this Court to review the City of Golden's ordinances and hold that Olson had a legitimate claim of entitlement under that land use scheme.

D. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) Does Not Preclude Relief for Olson.

Although the Court will defer to a state court's construction of a state law or ordinance, "once any ambiguities as to the meaning of the statute are resolved, [this Court may] form [its] own judgment as to its operative effect." *Wisconsin v. Mitchell*, 508 U.S. 476, 483-484 (1993). Here, there was no dispute over the specific meaning of the Golden Municipal Code. Rather, Olson and the City of Golden disagreed over its operative effect, and the Colorado Supreme Court sided with the City of Golden, finding that the Golden Municipal Code operated to create no legitimate claim of entitlement. This interpretation does not bind this Court, and the City of Golden's reliance on *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) is misplaced. Although this Court may give careful consideration to the Colorado Supreme Court's views as to the "purpose, scope and operative effect" of the Golden Municipal Code, *Reitman v. Mulkey*, 387 U.S. 369, 373-374 (1967), this Court can and should reverse the Colorado Supreme Court when the City of Golden's ordinances at issue so clearly give Olson a legitimate claim of entitlement to prohibit the offending land uses adjacent to her property.

E. Much of the *Brief in Opposition* Is Irrelevant to the Issues Before this Court.

Starting on page nineteen of the *Brief in Opposition*, the City of Golden argues that even if Olson shows a property interest, her due process claim nonetheless fails. This issue is not before the Court. Olson has not asked this Court to evaluate other elements of her due process claim, nor has she asked this Court to define the proper remedy for the due process violation at issue. Rather, Olson simply asks this Court to determine whether she has a property right in the first instance. Olson understands that she may be required to appear again before the Colorado Supreme Court to argue what process is due once this Court has determined that she has a property right deserving of Fourteenth Amendment protection.

CONCLUSION

This Court should grant the *Petition*.

Respectfully submitted,

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